***United States Court of Appeals***

***for the Second Circuit***


# AMICUS BRIEF

United States Court of Appeals
For the Second Circuit

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| Gerard and Gemma Brault, Plaintiffs-Appellants, | : | No. 55 |
| -v- | : | Docket No. 74-2370 |
| Town of Milton, Defendant-Appellee. | : | |



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P/S

# BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VERMONT

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# INTRODUCTION

Appellants urge this Court to recognize a cause of action arising under the Due Process Clause of the Fourteenth Amendment and the "taking" clause of the Fifth Amendment, thereby rendering the Town of Milton, Vermont, liable for damages caused by the allegedly unconstitutional actions of its officials in enforcing an invalid zoning ordinance.[1/]

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1/ Apparently, appellants argue that the enforcement of a local zoning law which was knowingly or negligently enacted in violation of state procedural requirements constitutes a deprivation of property without due process of law. Whether or not appellants ultimately prevail on the merits, amici assume that their claim is not patently frivolous within the meaning of Bell v. Hood, 327 U.S. 678 (1946). Of course, recognition of Federal question jurisdiction and a constitutionally founded cause of action does not imply a favorable view of the merits; nor does it determine what affirmative defenses, if any, would be available to the Town of Milton on remand. Cf. Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972). This brief will address only the question of the propriety of implementing a cause of action for damages founded directly on the Constitution.

As framed by the parties and the panel of this Court which originally adjudicated this appeal, the issue is whether the principles of Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), dictate the judicial implementation of a cause of action for damages based directly on the due process clause of the Fourteenth Amendment and the "taking" clause of the Fifth Amendment.

In this brief, amici will argue that the principles of Bivens do dictate the judicial implementation of the cause of action which the appellants invoke. But, initially, we wish to call the Court's attention to an independent tradition, well established within the federal judiciary, of recognizing a federal cause of action for damages against municipalities to redress unconstitutionally inflicted injuries to property interests.

## A R G U M E N T

### I

### COURTS WITHIN THE FEDERAL SYSTEM HAVE TRADITIONALLY RECOGNIZED A CAUSE OF ACTION IN DAMAGES FOR UNCONSTITUTIONALLY INFLICTED INJURIES TO PROPERTY. THIS TRADITION INCLUDES THE AWARD OF DAMAGES AGAINST MUNICIPALITIES.

### A. The Distinct Tradition of the Property Injury Cases

The claim of the appellants -- for damages growing out of an injury inflicted upon their real property interests by municipal conduct which violates the due process clause of the Fourteenth Amendment -- rests upon a secure doctrinal foundation. Well before the decision in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra, it was established that an action for damages would lie in federal court for an unconstitutional "taking" of property by a municipal entity, despite the absence of any congressional authorization of such a cause of action.

At the root of this tradition is the perception that the Fifth Amendment's prohibition of the taking of private property without just compensation gives rise to a cause of action for damages, cognizable in the federal courts, and independent of statutory authorization. This perception was made explicit by the Supreme Court in Jacobs v. United States, 290 U.S. 13 (1933). In Jacobs, the Court of Appeals had held that an injured property owner's sole right of recovery against the United States

government arose under the Tucker Act, which recognized only claims founded "upon any contract, express or implied."[2/] This limitation, in turn, was held to preclude the recovery of interest by the landowner.[3/] In reversing the Court of Appeals on the question of interest, the Supreme Court brushed aside the apparent restrictions of the Tucker Act, finding the statutory limitations upon the landowner's recovery irrelevant to his constitutionally founded claim:

> "The suits were based on the right to recover just compensation for property taken by the United States....That right was guaranteed by the Constitution....It rested upon the Fifth Amendment. Statutory recognition was not necessary.
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> * * * *
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> "[T]he right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate." 290 U.S. at 16-17.

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2/ See Jacobs v. United States, 45 F. 2d 34, 37 (5th Cir. 1973).

3/ See Jacobs v. United States, 63 F. 2d 326 (5th Cir. 1933).

See also, Seaboard Air Line Railroad v. United States, 261 U.S. 299, 306 (1923); and United States v. Rogers. 255 U.S. 163, 169 (1921).

The Fifth Amendment prohibition against the taking of property without just compensation has, of course, been incorporated into the Fourteenth Amendment due process clause. See Chicago Burlington & Quincy Railroad v. Chicago, 166 U.S. 266 (1897); Cuyahoga River Power Co. v. City of Akron, 240 U.S. 462 (1916); Malloy v. Hogan, 378 U.S. 1, 4 (1964).

In turn, the lower Federal courts routinely have entertained claims for unconstitutionally inflicted injury to property interests pursuant to the Fourteenth Amendment due process clause. These actions have been brought under the jurisdiction conferred by 28 U.S.C. § 1331(a), and have recognized a constitutional cause of action in damages without any statutory authorization for such an action. 4/

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4/ These actions have not been brought under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 for two reasons: (1) the property/personal right distinction under 42 U.S.C. § 1983, which prevailed until Lynch v. Household Finance, 405 U.S. 538 (1972); and (2) the limits of 42 U.S.C. § 1983 in reaching municipalities, at least after Monroe v. Pape, 365 U.S. 167 (1961).

Without statutory authorization for recovery of damages in these cases, the causes of action clearly arise directly under the Fourteenth Amendment. Consider, for example, this Court's decision in Eisen v. Eastman, 421 F. 2d 560 (2d Cir. 1969). In the Eisen case, Judge Friendly's closely reasoned opinion for the Court dealt at length with the plaintiff's contention that he could recover damages pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343 for what he claimed was a deprivation of property without due process of law effectuated by rent control provisions. Judge Friendly found these provisions of the Civil Rights Act of 1871 unavailable for the redress of property rights, relying on the opinion of Justice Stone in Hague v. C.I.O., 307 U.S. 496, 518-532 (1939).[5/] He went on, however, to find 28 U.S.C. § 1331(a) an appropriate means for the prosecution of the damage claim, notwithstanding the absence of a statutory cause of action.[6/] See also, Ballard Fish & Oyster Co. v.

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5/ The property/personal right distinction was repudiated by the Supreme Court in Lynch v. Household Finance, supra.

6/ Ultimately, the Court in Eisen found that the plaintiff had failed to exhaust his administrative remedies, and expressed the view that the plaintiff would not prevail on the merits.

Glaser Construction Co., 424 F. 2d 473 (4th Cir. 1970).

B. Actions Against Municipalities

Property injury cases of this sort under 28 U.S.C. § 1331(a) have routinely been entertained against municipalities and other governmental entities which are exempt from liability under 42 U.S.C. § 1983 and 28 U.S.C. § 1343. See, e.g., Matherson v. Long Island State Park Commission, 442 F. 2d 566 (2d Cir. 1971); City of Inglewood v. City of Los Angeles, 451 F. 2d 948 (9th Cir. 1972); Miller v. County of Los Angeles, 341 F. 2d 964 (9th Cir. 1965); Lowe v. Manhattan Beach School District, 222 F. 2d 258 (9th Cir. 1955); Foster v. Herly, 330 F. 2d 87 (6th Cir. 1964); Foster v. City of Detroit, 405 F. 2d 138 (6th Cir. 1968);[7/] Traylor v. City of Amarillo,

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7/ In a more recent case, Gibson & Perin Co. v. City of Cincinnati, 480 F. 2d 936 (6th Cir. 1973), the Court acknowledged the continuing vitality of the Foster cases, but found no cognizable property interest or claim of an unconstitutional "taking." Absent such a claim, the Court found 42 U.S.C. § 1983 unavailable, and did not discuss the possibility of 28 U.S.C. § 1331 jurisdiction. See 480 F. 2d at 942, n. 3, & 947.

Texas, 492 F. 2d 1156 (5th Cir. 1974); Haczela v. City of Bridgeport, 299 F. Supp. 709 (D. Conn. 1969) (Per Timbers, J.); Amen v. City of Dearborn, 363 F. Supp. 1267 (E.D. Mich. 1973); Madison Realty Co. v. City of Detroit, 315 F. Supp. 367 (E.D. Mich. 1970); Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Calif. 1974); and Miles v. District of Columbia, 354 F. Supp. 577 (D.C. D.C. 1973).[8/]

The Supreme Court has not reviewed any of these municipal property injury cases arising under the Fourteenth Amendment and initiated in federal court pursuant to 28 U.S.C. § 1331. In a somewhat less direct fashion, however, the analytical basis of these cases has been validated. In Griggs v. Allegheny County, 369 U.S. 84 (1962), the Supreme Court, reversing the Supreme Court of Pennsylvania, held that the County of Alleghany was liable in damages for injury to plaintiffs' property caused by airplane overflights. In directing the state

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8/ Very few cases stand in opposition to this tradition. One such case is Perzanowski v. Salvio, 369 F. Supp. 223 (D. Conn. 1974). There the Court considers the applicability of Bivens; significantly, it ignores the entire body of property injury cases cited and discussed above.

court to award damages to the plaintiff pursuant to the Fourteenth Amendment, the Supreme Court was plainly either (1) directing the state court to recognize a wholly federal cause of action springing from the Fourteenth Amendment, or (2) directing the state court to exercise its own remedial authority in conformity with the norms of the Fourteenth Amendment.[9/] This is a distinction without consequence for our purposes. If (1) correctly expresses the rationale of Griggs, then the federal cause of action surely ought be cognizable in the lower federal courts. If (2) is the correct interpretation, and the Supreme Court was in effect holding the state court constitutionally obliged to apply its remedial authority in a given fashion, then, a fortiorari, the lower federal courts should be obliged to exercise their remedial authority in the same fashion. See Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1116

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9/ The Supreme Court in Griggs could not have been directing the state court to apply the cause of action authorized in 42 U.S.C. § 1983, since Monroe v. Pape, supra, had been decided just one year earlier, and any possibility of governmental liability for damages under the statute extinguished.

(1969).[10] Griggs thus secures the almost uniform undertaking of the lower federal courts to extend the central premise of Jacobs v. United States -- that the Fifth Amendment affords a basis for a cause of action in damages even absent statutory authorization -- to claims against governmental entities acting under state law.

C. The Property Injury Cases and Bivens

The property injury cases both predate and postdate Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, supra, and appear to stand on an independent footing.[11]

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10/ Parenthetically, the distinction between a cause of action arising independently from the Constitution or one effectuated through the general remedial authority of the federal courts was not resolved in Bivens. There, the Supreme Court alternately spoke in each mode. Compare 403 U.S. at 395 ("an independent claim both necessary and sufficient to make out the plaintiff's cause of action,"), with 403 U.S. at 397 ("a particular remedial mechanism normally available in the federal courts.").

11/ With the repudiation of the property/personal rights distinction, one ground for the independence of the property injury casesmay have been dissipated. But any merger of the traditions will presumably be in the direction of expanding the damage remedies in non-property cases; it would be anomalous if the expansive reading of federal statutory jurisdiction in Lynch v. Household Finance, supra, were to effectuate a drastic contraction of the

But reconciling the two traditions is not difficult. Two basic questions were preeminent in the Court's resolution of the Bivens controversy.[12] For Justice Brennan, writing on behalf of the majority, the critical issue was whether the Fourth Amendment was an independent source of law such as could sustain a cause of action for damages. That issue was firmly resolved as regards the Fifth Amendment taking clause in Jacobs v. United States, supra. The question in Bivens, in essence, was whether the Fourth Amendment could be treated as the Fifth already had been. Thus, Judge Lumbard, writing for this Court in Bivens, distinguished Jacobs as particular to the Fifth Amendment. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 409 F. 2d 718, 723 (1970). Before the Supreme Court, the government defendants in Bivens similarly recognized and sought to distinguish Jacobs and its Fifth

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11/ (cont.) established remedial authority of the federal courts. If a distinction is to be drawn, it will presumably be on the functional grounds that the property injury cases are singularly manageable in judicial proceedings for damages. See discussion at p. 12, infra.

12/ A more detailed discussion of the opinions in Bivens follows, infra at pp. 17-21.

Amendment predicate. See Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. 1532, 1542, n. 58 & text, (1972).

For Justice Harlan, in his concurring opinion, the central issue was not the power of the Court to award damages, but rather the appropriate circumstances for the exercise of that power. In determining that Bivens involved "a claim of the sort that, if proved, would be properly compensable in damages," Justice Harlan relied heavily on "the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation." 403 U.S. at 408-409. The property injury cases involve assessments of value and injury which are commonplace to the business of state and federal courts alike.

### D. The Scope of the Injuries Subsumed in the Property Cases

The property injury cases span a broad range of injuries to the interests of real property owners. Their

range includes cases challenging the onerous or arbitrary quality of restraints on the use of land [See, e.g., Eisen v. Eastman, supra; and Dahl v. City of Palo Alto, supra], cases challenging the procedures employed in determining the appropriateness of acts injurious to property interests [See, e.g., Traylor v. City of Amarillo, supra; and Miles v. District of Columbia, supra], and cases involving issues of harassment, negligence and nuisance [See, e.g., Matherson v. Long Island State Park Commission, supra; and Haczela v. City of Bridgeport, supra]. It is well established that official behavior can constitute an unconstitutional deprivation of property within the tradition of these cases even if the behavior contravenes state law. See, e.g. Cuyahoga River Power Co. v. City of Akron, supra; Mosher v.City of Phoenix, 287 U.S. 29 (1932); Matherson v. Long Island State Park Commission, supra; and Amen v. City of Dearborn, supra.

To be sure, not all of these claims have prevailed on the merits; but they have consistently been heard as causes of action for damages arising directly under the Fifth or Fourteenth Amendments, pursuant to the juris-

diction conferred by 28 U.S.C. § 1331 or its statutory ancestors. The claim of the appellants for damages against the Town of Milton[13/] is plainly of a piece with this tradition.

## II

## THE PRINCIPLES OF BIVENS COMPEL THE RECOGNITION OF APPELLANTS' CLAIM FOR DAMAGES AGAINST THE TOWN OF MILTON.

### A. Introduction

The invocation of a Bivens cause of action by the appellants raises two major analytical issues: First, does the recognition in Bivens of a cause of action for damages arising under the Fourth Amendment justify the recognition of a similar cause of action pursuant to the Fourteenth and Fifth Amendments? Second, does the recognition in Bivens of a cause of action for damages against federal officials justify the recognition of a similar cause of action against state entities which do not qualify for Eleventh Amendment protection?

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13/ See note 1, supra.

The first question can easily be answered in the affirmative. The property related claims of the appellants are an a fortiorari case for the application of the Bivens rationale. See the discussion above, at page 12.

The second question requires more complex analysis, and it is to such analysis that the balance of this brief is devoted, after an initial review of the Bivens decision itself and the lower federal courts' reactions to Bivens.

In City of Kenosha v. Bruno, 412 U.S. 507 (1973) the Supreme Court, although not ruling squarely on the issue, appeared to suggest the availability of a Bivens cause of action against municipalities.[14/] Amici respectfully urge

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14/ Justices Brennan and Marshall, concurring in City of Kenosha v. Bruno, 412 U.S. 507, 516 (1973), explicitly recognized such a cause of action. In recognizing such a cause of action, the Kenosha Court was acting consistently with a number of Federal cases. E.g., Jacobs v. United States, 290 U.S. 13 (1933)(Fifth Amendment creates cause of action for damages from illegal taking); Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913)(Fourteenth Amendment creates cause of action for unlawful deprivation of property); Ex parte Young, 209 U.S. 123 (1908)(Fourteenth Amendment creates cause of action for unlawful deprivation of property); Swafford v. Templeton, 185 U.S. 487 (1902)(Article 1, Section 2 creates cause of action for unlawful deprivation of vote); Wiley v. Sinkler, 179 U.S. 58 (1900)(same);

this Court to implement such a cause of action by ruling, first, that causes of action for damages to property flow directly from the due process clause of the Fourteenth Amendment and the "taking" clause of the Fifth Amendment, as well as from the various provisions of the Bill of Rights and, second, that such causes of action run against any state or local entity which is not within the purview of the Eleventh Amendment.

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14/ (cont.) Skehan v. Bloomsburg State College, 501 F. 2d 31, 44 (3d Cir. 1974); Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974); Dupree v. City of Chattanooga, 362 F. Supp. 1136 (E.D. Tenn. 1973). See also, City of Inglewood v. City of Los Angeles, 451 F. 2d 948 (9th Cir. 1972); Traylor v. City of Amarillo, Texas, 492 F. 2d 1156 (5th Cir. 1974); Lowe v. Manhattan Beach School District, 222 F. 2d 258 (9th Cir. 1955); Foster v. City of Detroit, 405 F. 2d 138 (6th Cir. 1968); Foster v. Herly, 330 F. 2d 87 (6th Cir. 1964); Miller v. County of Los Angeles, 341 F. 2d 964 (9th Cir. 1964); Eisen v. Eastman, 421 F. 2d 560 (2d Cir. 1969); Haczela v. City of Bridgeport, 299 F. Supp. 709 (D. Conn. 1969)(per Timbers, J.); Amen v. City of Dearborn, 363 F. Supp. 1267 (E.D. Mich. 1973); Miles v. District of Columbia, 354 F. Supp. 577 (D. D.C. 1973); Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974); Matherson v. Long Island State Park Commission, 442 F. 2d 566 (2d Cir. 1971); Madison Realty Co. v. City of Detroit, 315 F. Supp. 367 (E.D. Mich. 1970).

## B. Bivens and Its Progeny

In Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized a Federally cognizable cause of action for damages, sounding directly in the guarantees of the Fourth Amendment, against a Federal official who had allegedly engaged in an illegal search and seizure. Bivens resoundingly affirmed the power -- and the duty -- of the federal courts to enforce the provisions of the Constitution with the full panoply of traditional judicial remedies -- including damages -- whether or not Congress has explicitly provided a statutory damage remedy.

### 1. The Majority Opinion in Bivens

Justice Brennan, writing for the Court in Bivens, rejected the Government's contention that the Fourth Amendment does not provide an affirmative source of federally guaranteed rights, but merely limits the defenses which a law enforcement official was entitled to present in defending a state action sounding in trespass. Justice Brennan stressed that the purpose of the Fourth Amendment was not merely to supplement traditional state law protecting privacy, but to regulate the relationship between

citizens and officials clothed with governmental authority -- regardless of whether the government official is acting in violation of state law governing private behavior as well. Stressing that Fourth Amendment protection is broader than the protections generally afforded by state law for private intrusions of privacy and that the privacy interests protected by the Fourth Amendment differ markedly from the interests guarded by state law, Justice Brennan concluded that the Fourth Amendment is a primary source of law, wholly independent from the similar -- and occasionally overlapping -- state causes of action for invasions of privacy interests. Having established the Fourth Amendment as an independent source of law, Justice Brennan reasoned that damages, as a traditional remedy for the violation of personal liberty, were presumptively available to enforce the law in the absence of significant considerations militating against use of damages as a remedial device.

2. Justice Harlan's Concurrence in Bivens

Justice Harlan concurred in recognizing a cause of

action for damages sounding directly in the Constitution. Rejecting the government's contention that the Fourth Amendment created no independent Federal rights, he ruled that the unquestioned ability of a federal court to issue injunctive relief against prospective Fourth Amendment violations demonstrated that the Fourth Amendment created substantive rights derived from Federal law. However, while the presence of a "Federal" source of law persuaded the majority, without more, that damages were a presumptively appropriate remedial device, Justice Harlan was concerned with two additional questions -- neither of which troubled the majority. First, even assuming the existence of the Fourth Amendment as an independent source of Federal law, are the Federal courts empowered to utilize damages as a remedial sanction in the absence of express Congressional authorization; and, second, even if the Federal courts are empowered to utilize damages in the absence of Congressional authorization, what criteria ought to guide a court in deciding whether a damage remedy should be recognized?

In ruling that Federal courts clearly possess power

to award damages for constitutional violations in the absence of Congressional authorization, Justice Harlan analogized to the recognized judicial practice of implying damage remedies for breach of Federal statutory law, whenever damages are "appropriate" to advance the policies underlying the Federal act, e.g., J.I. Case Co. v. Borak, 377 U.S. 426 (1964). He noted that it would be absurd to recognize such a power where relatively less important statutory rights were at stake, but to withhold it when the courts sought to vindicate paramount social interests embedded in the Constitution.[15/]

Having satisfied himself that a Federal court possesses power to recognize a cause of action for damages sounding in the Constitution, Justice Harlan turned his attention to the factors which should influence a court in determining whether to exercise the power. Once

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15/ Justice Harlan also stressed the conceded power of the Federal courts to enjoin constitutional violations without regard to statutory authorization. He reasoned that, since injunctions and damages are "traditionally available" judicial remedies, the power to grant one in the absence of Congressional authorization implies the power to grant the other.

again drawing on the tradition of implying damage remedies for Federal statutory provisions, Justice Harlan suggested adoption of the identical statutory standard of whether damages are "appropriate" or "necessary" to vindicate the Federal interests at stake. Since the Federal interests at stake in a Fourth Amendment case have traditionally been capable of monetary valuation and since those interests are not likely to be effectively vindicated by actions in state court, by Federal injunctive relief, or by the exclusionary rule, the recognition of a damage action, subject to appropriate affirmative defenses seemed entirely appropriate.[16/]

3. The Post-Bivens Recognition of Causes of Action for Damages Sounding Directly in the United States Constitution.

This Court has not had the occasion to rule on the scope of the principles articulated by the Supreme Court

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16/ Justice Harlan, as did the majority, explicitly rejected the government's assertion that a more stringent standard should control judicial recognition of "implied" damages for constitutional violations than exists for statutory violations. Thus, damages need only be an appropriate remedy -- not the only possible remedy -- in order to warrant recognition of a cause of action for damages for unconstitutional conduct.

in Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics, supra.[17] But the questions of the application of Bivens to other constitutional provisions than the Fourth Amendment, and to the conduct of entities acting under state law, has been reached by various lower Federal courts. While the conclusions of these courts have not been uniform, a broad reading of the Bivens principles has generally prevailed, as regards both the "horizontal" question of constitutional substance, and the "vertical" question of behavior under state law.

Provisions of the Constitution to which the Bivens rationale have been held to extend include the First

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17/ The question of the reach of Bivens was expressly left open in Wahba v. New York University, 492 F. 2d 96, 103-104 (2d Cir. 1974). In Wahba, Judge Friendly adopted the formulation of the question employed by Justice Harlan in his concurring opinion in Bivens; that formulation would make decisive of the issue of extending Bivens the difficulty of the judiciary making determinations of "causation and magnitude of injury" in the context of the constitutional right being asserted. Here, of course, the rights involved are entirely susceptible of traditional judicial evaluation. See the discussion at p. 12, supra.

Amendment,[18] the substantive and procedural aspects of the due process clause of the Fifth Amendment,[19] as well as the privilege against self incrimination,[20] the Eighth Amendment,[21] the substantive and procedural

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18/ See Skehan v. Trustees of Bloomsberg State College, 501 F. 2d 31 (3d Cir. 1974); Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973); Gardels v. Murphy, 377 F. Supp. 1389 (N.D. Ill. 1974); and Peacock v. Board of Regents of University & State College of Arizona, 380 F. Supp. 1081 (D. Ariz. 1974); Contra, see Moore v. Schlesinger, 384 F. Supp. 163 (D. Cal. 1974); and Smothers v. Columbia Broadcasting System, 351 F. Supp. 622 (C.D. Cal. 1972).

19/ United States ex rel. Moore v. Koelzer, 457 F. 2d 892 (3d Cir. 1972); Bethea v. Reid, 445 F. 2d 1163 (3d Cir. 1971); Jones v. Perrigan, 459 F. 2d 81 (6th Cir. 1972); United States ex rel. Harrison v. Pace, 357 F. Supp. 354 (E.D. Penn. 1973); and Johnson v. Alldredge, 349 F. Supp. 1230 (M.D. Pa. 1972). Contra, see Davidson v. Kane, 337 F. Supp. 922 (E.D. Va. 1972).

20/ Shaffer v. Wilson, 383 F. Supp. 554 (D. Col. 1974).

21/ Waltenberg v. New York City Department of Correction, 376 F. Supp. 41 (S.D. N.Y. 1974) (per Gurfein, J.); and Walker v. McCune, 363 F. Supp. 254 (E.D. Va. 1973). Compare, Polakoff v. Henderson, 370 F. Supp. 690 (N.D. Ga. 1973).

aspects of the due process clause of the Fourteenth Amendment,[22] and the equal protection clause.[23]

Among the cases extending the reach of the Bivens principle are a number which recognize causes of action for damages in redress of the unconstitutional behavior of entities acting under the color of state law but outside the provisions of 42 U.S.C. § 1983. Among these cases are Skehan v. Trustees of Bloomsberg State College, 501 F. 2d 31 (3d Cir. 1974); Dahl v. City of Palo Alto, 372 F. Supp. 647 (S.D. Cal. 1974);[24] Waltenberg v. New

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22/ Dahl v. City of Palo Alto, 372 F. Supp. 647 (S.D. Cal. 1974); Waltenberg v. New York City Department of Correction, 376 F. Supp. 41 (S.D. N.Y. 1974)(per Gurfein, J.); and Peacock v. Board of Regents of University and State College of Arizona, 380 F. Supp. 1081 (D. Ariz. 1970). These citations do not include the property injury cases cited and discussed in Point I of this brief, supra.

23/ Skehan v. Trustees of Bloomsberg State College, 501 F. 2d 31 (3d Cir. 1974); Maybanks v. Ingraham, 378 F. Supp. 913 (E.D. Penn. 1974); and Singleton v. Vance County Board of Education, 501 F. 2d 429, 432-33 (4th Cir. 1974) (concurring and dissenting opinion per Winters, J.).

24/ The Dahl case is a property injury case of the type discussed in Point I of this brief, supra. However, it contains what may well be the most thoughtful judicial discussion of the extension of Bivens to state law entities, particularly with regard to the bearing of the Civil Rights Act of 1871. See 372 F. Supp at 650-51.

York City Department of Correction, 376 F. Supp. 41 (S.D. N.Y. 1974)(per Gurfein, J.), Maybanks v. Ingraham, 378 F. Supp. 913 (E.D. Penn. 1974); and Peacock v. Bd. of Regents of University & State College of Arizona, 380 F. Supp. 1081 (D. Ariz. 1974).[25] See also, Singleton v. Vance County Board of Education, 501 F. 2d 429, 432-33 (4th Cir. 1974) (concurring and dissenting opinion per Winters, J.; majority does not reach issue); Bishop v. Wood, 498 F. 2d 1341, 1342 (4th Cir. 1974)(dissenting opinion per Winters, J.; majority does not reach issue).[26]

The general recognition by the Federal judiciary of the propriety of damage actions against municipalities for constitutional interference with property rights accurately reflects the existence of an underlying constitutional cause of action for damages which operates independently of the statutory cause of action provided by the Civil Rights Act of 1871. Accordingly, we turn to a consideration of the relationship of the Civil Rights Act of 1871 to the underlying constitutional cause of action it was designed to supplement.

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25/ Not included in this list are the property injury cases cited and discussed in Point I of this brief, supra.

26/ Contra, Perzanowski v. Salvio, 369 F. Supp. 223 (D. Conn. 1974); and Smetanka v. Ambridge, 378 F. Supp. 1366 (W.D. Penn. 1974).

C. The Application of Bivens to State Entities Which Would Not Be Liable Under the Civil Rights Act of 1871

In Monroe v. Pape, 365 U.S. 167 (1961), the Supreme Court held that Congress, in enacting the Civil Rights Act of 1871 (42 U.S.C. §1983), did not intend to create a cause of action against a municipal corporation. Accordingly, it is now clear that claims based upon the Civil Rights Act of 1871 may not seek damages or equitable relief against a municipality, even if the municipality no longer would enjoy immunity from suit under local law. Moor v. County of Alameda, 411 U.S. 693 (1973); City of Kenosha v. Bruno, 412 U.S. 507 (1973).[27/]

In the instant case, amici believe that, notwithstanding the Supreme Court's construction of the term "person" in the Civil Rights Act of 1871, a Federal

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27/ Of course, to the extent a state cause of action would lie against a municipality, a District Court may, in its discretion, entertain the state cause of action as pendent to the Federal civil rights claim against the agents of the municipality. E.g., United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Moor v. County of Alameda, 411 U.S. 693 (1973).

cause of action, founded directly on the constitutional provisions involved, exists against the town of Milton, Vermont, for damages caused by the authorized but unconstitutional actions of its agents. While, at first glance, it may appear anomalous to recognize a constitutional cause of action against a class of defendants which Congress chose to exempt from the reach of a related statutory liability,[28] an examination of the history and primary function of the Civil Rights Act of 1871 and the creation of Federal question jurisdiction in 1875, viewed against the contemporaneous legal issues of the day, supports the conclusion that an independent constitutional cause of action exists against a municipality for the unconstitutional acts of its agents. See, Dahl v. City of Palo Alto, 372 F.Supp. 647 (N.D.Cal. 1974).

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28/ In his dissent from the panel's original recognition of a Bivens cause of action herein, Judge Timbers suggested that the exemption of municipalities from 1983 liability constituted an affirmative act by Congress, which precluded judicial recognition of a parallel constitutionally based liability. Payne v. Mertens, 343 F. Supp. 1355 (N.D.Cal. 1972); Perzanowski v. Salvio, 369 F. Supp. 223 (D.Conn. 1974). But see, Haczela v. City of Bridgeport, 299 F.Supp. 709 (D.Conn. 1969)(per Timbers, J.).

1. The Civil Rights Act of 1871 and Official Misconduct in Violation of Both State And Federal Law

Prior to the 1870's, Federal judicial enforcement of rights arising under the Constitution of the United States was centered in the appellate jurisdiction of the Supreme Court. Judiciary Act of 1789, Section 25; 1 Stat. 85. Thus, if a state official, acting pursuant to his state-sanctioned authority, behaved in an allegedly unconstitutional manner, his actions were subject to appellate scrutiny by the Supreme Court. E.g., Martin v. Hunter's Lessee, 1 Wheat. 304 (1816); Cohens v. Virginia, 6 Wheat. 264 (1821). If, however, the same state official, acting in excess of or in violation of state law, behaved in an allegedly unconstitutional manner, substantial doubt existed in 1871 whether such official misconduct, violative of state as well as Federal law, would trigger Federal judicial review, both because it did not satisfy the then prevailing extremely narrow conception of state action, e.g., Barney v. City of New York, 193 U.S. 430 (1904) and because a challenge to such misconduct, sounding substantially in state law, did not satisfy the exceedingly

technical view of Supreme Court appellate jurisdiction espoused by cases such as Murdock v. City of Memphis, 20 Wall. 590 (1875). It was, therefore, unclear in 1871 whether a plaintiff who had been injured by official misconduct in violation of state as well as Federal constitutional law would be assured of Federal judicial review of his Federal claim -- either by appellate review in the Supreme Court, or, after 1875, by Federal question jurisdiction in the lower Federal courts. It was, amici suggest, the primary function of the Civil Rights Act of 1871 to ensure that such official misconduct, which might otherwise have evaded Federal judicial scrutiny, was brought within the purview of the Federal judiciary by expanding the then prevailing notion of "state action" to include official conduct which, while in violation of state law, was taken under color of state authority.

The Reconstruction Congress was faced with two broad species of official misconduct -- 1) official conduct sanctioned by state law but allegedly violative

of the Federal constitution, and 2) official conduct allegedly violative of the Federal Constitution but also violative of state law. Congress, in 1871, was aware that the first species of conduct, state-sanctioned violations of the Constitution, were readily reviewable by the Supreme Court; whereas the identical Federal violation, lacking the sanction of state law, might never qualify for Supreme Court appellate review. Moreover, Congress in 1871 was aware that state-sanctioned violations of Federal law clearly satisfied the requirement of "state action"; while the then prevailing legal view perceived the identical official act, if also violative of state law, as merely the act of a private individual which would not constitute "state action". E.g., Barney v. City of New York, 193 U.S. 430 (1904). Cf. Wheeldin v. Wheeler, 373 U.S. 647 (1963) (unauthorized act of HUAC investigator not "federal action" for purposes of Fourth Amendment). Third, Congress, in 1871, recognized that challenges to state-sanctioned unconstitutional behavior undoubtedly arose under the

Constitution of the United States since, by definition, no violation of state law giving rise to a state cause of action had occurred; while acts violative of state and Federal law might not arise under the Constitution of the United States until the state cause of action was determined. Finally, Congress, in 1871, was aware that overt, state-sanctioned, constitutional violations were relatively rare and that the bulk of official action violative of the Federal Constitution confronting the Reconstruction Congress was also in violation of an abstract norm of state behavior as well. It was, therefore, the primary purpose of the Civil Rights Act of 1871 to bring such "lawless" unauthorized official action clearly within the ambit of Federal judicial review since, in the absence of Congressional legislation, such official misconduct might well have fallen outside traditional notions of Supreme Court appellate review and beyond the generally accepted scope of Federal judicial power which became codified as Federal question jurisdiction in 1875.

Cf. Wheeldin v. Wheeler, 373 U.S. 647 (1963).[29] Of course, since Congress, in enacting the ancestor of §1983 was primarily concerned with providing a Federal forum within which to review the acts of state officials violative of both state and Federal law, the decision to omit vicarious municipal liability is readily under-

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29/ In Wheeldin, a unanimous Supreme Court illustrated the dilemma facing the post-Civil War Congress by ruling that the unauthorized act of a Federal official would not be deemed governmental action for the purposes of the Fourth or Fifth Amendments, since Congress had never enacted a Federal analogue of 1983. Similarly, technical views of state action plagued attempts by the post-Civil War judiciary to enforce Federal constitutional rights in the absence of affirmative congressional legislation such as 1983. Justice Douglas, writing for the Court in Wheeldin, explicitly contrasted Congress' action in passing 1983 covering unauthorized state actions taken "under color of law" with its failure to similarly expand the definition of official acts by Federal officials in excess or violation of their authority. It is probable that just as Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913) ultimately recognized such "unauthorized" activity as state action, so Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) recognizes such "unauthorized" activity as Federal governmental action as well. Compare, Barney v. City of New York, 193 U.S. 430 (1904) and Home Telephone & Telegraph v. City of Los Angeles, supra, with Wheeldin v. Wheeler, 373 U.S. 647 (1963) and Bivens, supra.

standable. By definition, the lawless officials against whom §1983 was initially designed to operate were acting in violation of state law and, therefore, ought not to have subjected their innocent principals to derivative and wholly undeserved liability. Such an omission of municipal liability is not the least instructive, however, when the official misconduct involved has been carried out, not in violation of state law, but pursuant to its command or authorization. Under such circumstances, wholly different considerations enter into a determination as to whether a municipality is liable for the authorized, unconstitutional acts of its' agents. Thus, the assumption by Judge Timbers in his dissent from the original panel decision, that the exemption of municipal liability from 1983 (centering, as it did, on misconduct violative of both state and Federal law) compels a similar exemption from constitutional liability appears to be incorrect. In fact, when state-sanctioned unconstitutional behavior was before Congress in connection with the establishment of Federal

question jurisdiction in 1875, no hint of any intent to exclude municipalities from liability exists.

2. The Establishment of Federal Question Jurisdiction and Its Relation to State-Sanctioned Official Action in Violation of Federal Constitutional Rights

A primary purpose of the Civil Rights Act of 1871 was to insure Federal judicial review over lawless official action violative of both Federal and state law. Similar affirmative legislation was not necessary, however, to assure Federal judicial review of state-sanctioned unconstitutional behavior. Such behavior had long been subject to appellate scrutiny by the Supreme Court and, with the creation of Federal question jurisdiction in 1875, primary Federal responsibility for the review of state-sanctioned unconstitutional behavior shifted from the appellate docket of the Supreme Court to the original jurisdiction of the lower Federal courts. Since such state-sanctioned unconstitutional behavior was clearly state action, even under the restrictive Barney rule, and since the constitutionality of such state action plainly raised questions arising under the Constitution

of the United States, no serious doubt existed in the last quarter of the 19th century concerning the recognition of purely constitutional causes of action running directly against state officials acting pursuant to state law, without the necessity of invoking the newly minted Civil Rights Act of 1871. Thus, in four celebrated cases, the Supreme Court entertained actions challenging the Federal constitutionality of state-authorized official action pursuant to a 1) "Bivens" cause of action, and 2) Federal question jurisdiction, without suggesting the necessity of resorting to the Civil Rights Act of 1871.

In Ex parte Young, 209 U.S. 123 (1908), the Supreme Court upheld the power of a Federal District Court to grant relief against a State Attorney General enjoining the enforcement of an allegedly unconstitutional statute. Since the action sought to be reviewed was state-sanctioned, no attempt to invoke the Civil Rights Act of 1871 was deemed necessary. Instead, all parties proceeded on the unquestioned assumption that a

sufficient cause of action against state action was provided by the provisions of the Fourteenth Amendment and that Federal question jurisdiction existed by virtue of the Judiciary Act of March 3, 1875; 18 Stat. 470.

In Wiley v. Sinkler, 179 U.S. 58 (1900) and Swafford v. Templeton, 185 U.S. 487 (1902), the Supreme Court upheld the jurisdiction of a Federal District Court to award damages against state election inspectors who were enforcing an allegedly unconstitutional state registration statute. Since the actions sought to be reviewed were state-sanctioned, no attempt to invoke the Civil Rights Act of 1871 was deemed necessary. Instead, all parties proceeded on the unquestioned assumption that a sufficient cause of action against state action was provided by Article I, Section 2 and that jurisdiction existed by virtue of the 1875 grant of Federal question jurisdiction.[30/]

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30/ In this Court's decision in Bivens (409 F.2d 718, 724) Judge Lumbard sought to lessen the force of Wiley and

Finally, in Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913), the Supreme Court upheld the power of a Federal District Court to enjoin the City of Los Angeles from imposing an unconstitutional rate structure upon the plaintiff. In Home Telephone, the actions over which plaintiff

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30/ (continued)
Swafford by suggesting that they could have been brought under the Civil Rights Act of 1871 and, thus, could not stand for the existence of an underlying constitutional cause of action. However, it is precisely the fact that the parties and the Court chose to ignore the 1871 Act in favor of proceeding pursuant to the 1875 Act which illustrates the contemporaneous perception of the 1871 Act as primarily concerned with official conduct in violation of both state and Federal law. In reality, the 1871 Act was an attempt to expand the notion of state action to cover any action by a state official, whether or not actually authorized by state law -- a view of state action which has now secured universal acceptance by the judiciary, even in the absence of Congressional legislation. E.g., Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, supra. In 1871, however, judicial recognition of such unauthorized conduct as state action was distinctly unlikely. Indeed, Mr. Justice Frankfurter never accepted it. E.g., Snowden v. Hughes, 321 U.S. 1, 13 (1944)(Frankfurter, J. concurring); Monroe v. Pape, 365 U.S. 167, 202 (1961)(Frankfurter , J. dissenting).

sought judicial review were state-sanctioned in that they were pursuant to state statute. Accordingly, no party deemed it necessary to invoke the Civil Rights Act of 1871 to bring the case within the scrutiny of a Federal Court.

In contrast, in Barney v. City of New York, 193 U.S. 430 (1904), a plaintiff sought Federal judicial review of New York's decision to build a subway without securing easements over affected adjacent property. He alleged that New York's actions deprived him of property without compensation and was in violation of New York law as well. Since plaintiff invoked Federal question jurisdiction on a cause of action sounding directly in the Fourteenth Amendment, the courts applied traditional analysis to find that plaintiff had not alleged state action and, thus, was not entitled to Federal judicial review. Ironically, the Civil Rights Act of 1871, which was aimed at such "lawless" official action was never invoked, probably because its applica-

bility to economic cases had been rendered questionable by Holt v. Indiana Manufacturing Co., 176 U.S. 68 (1900).[31]

Thus, contemporaneous usage reinforces the notion that until 1913, the Civil Rights Act of 1871 was primarily perceived as providing for Federal judicial review of unauthorized state action, while authorized state action remained fully reviewable in the Federal courts under a combination of Federal question jurisdiction and the recognition of independent constitutionally based causes of action against state action. However, with its decision in Siler v. Louisville & Nashville R.R., 213 U.S. 175 (1909) and Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913), the Supreme Court radically altered the existing perception of state action, by rendering unauthorized official conduct "state action" for the purposes of Federal judicial review of allegedly unconstitutional activity.

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31/ In Giles v. Harris, 189 U.S. 475 (1903), when plaintiff challenged a refusal to permit him to vote as a violation of both Federal and existing state law, he based jurisdiction on the Civil Rights Act of 1871, in marked contrast to Wiley and Swafford, where, because the actions at issue were sanctioned by state law, no problem of state action could arise and an independent constitutional cause of action existed.

### 3. The Rule of Home Telephone & Telegraph Co. v. City of Los Angeles and the de facto Coalescence of the Civil Rights Act of 1871 and Independent Constitutional Causes of Action

In Siler v. Louisville & Nashville R.R., 213 U.S. 175 (1909), the Supreme Court ruled that an allegation that a state official was acting in excess of his state authority and in violation of the Fourteenth Amendment stated a claim arising under the Constitution for the purposes of Federal question jurisdiction. Thus, for the first time in the absence of affirmative legislation (such as the Civil Rights Act of 1871), an unauthorized act of a state official was deemed state action against which the provisions of the Constitution created a self-executing cause of action. Siler foreshadowed the full-scale repudiation of the restrictive Barney vision of state action which occurred in Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913). In Home Telephone, the plaintiff challenged a proposed rate schedule imposed by the city of Los Angeles as violative of the Fourteenth Amendment. It was conceded by plaintiff that state law

authorized the rates in question.[32] In an attempt to avoid Federal judicial review, the City of Los Angeles argued that if the rates at issue violated the Fourteenth Amendment they must also be violative of the identically worded California constitution and, if Los Angeles' actions were in violation of the California constitution, they could not constitute state action for the purposes of Federal judicial review. See, Barney v. City of New York, 193 U.S. 430 (1904).[33] Justice White, writing for the Court, explicitly repudiated the notion that state action, within the meaning of the Fourteenth Amendment, "contemplates alone wrongs authorized by a state, and gives only power accordingly." Instead, he ruled... "the Amendment contemplates the possibility of state officers

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32/ Since state authorization was uncontested, plaintiff alleged Federal question jurisdiction and a cause of action sounding directly in the Fourteenth Amendment. See, supra, p. 38 .

33/ Amici believe that it was precisely to forestall such an argument, which was successful in the District Court and in Barney, that the 1871 Act was passed.

abusing the powers lawfully conferred upon them by doing wrongs prohibited by the Amendment.".[34] The enunciation of the broad proposition that unauthorized state action, if taken under color of law, would create a cause of action arising directly out of the Fourteenth Amendment constituted a dramatic break with the generally accepted notion of state action exemplified by Barney v. City of New York, supra. Thus, from and after Home Telephone & Telegraph, the distinction between a cause of action for unauthorized official misconduct (sounding in the Civil Rights Act of 1871) and a cause of action for state-sanctioned official misconduct (sounding directly in the relevant provision of the Constitution) was reduced dramatically in importance. The expansion in the reach of independent constitutional causes of action to cover

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34/ Significantly, Justice White recognized that the cause of action created by the Fourteenth Amendment is not confined by a restrictive definition of the "persons" against which it may be invoked. "[T]he provisions of the Amendment... are generic in their terms are addressed of course, to the states, but also to every person, whether natural or juridical, who is the repository of state power. 227 U.S. at 286. (emphasis added).

unauthorized, as well as authorized, official misconduct rendered the reach of the Civil Rights Act of 1871 coterminous with the newly expanded underlying constitutional cause of action and, not suprisingly, the judicial treatment of the statutory cause of action created by the Civil Rights Act of 1871 and the underlying causes of action created by the Constitution became virtually indistinguishable. This, in Hays v. Seattle, 251 U.S. 233 (1920), the plaintiff sued the Port of Seattle on causes of action sounding directly in the contract and taking clauses of the Constitution, alleging general Federal question jurisdiction; while in Nixon v. Herndon, 273 U.S. 536 (1927) and Nixon v. Condon, 286 U.S. 73 (1932) (the White Primary Cases), the plaintiff sued state election officials, acting pursuant to state law, on a cause of action sounding in the Civil Rights Act of 1871. The extent to which, in the wake of Home Telephone, the statutory cause of action had merged into its now virtually coterminous underlying constitutional cause of action is illustrated by a comparison of Wiley v. Sinkler, 179 U.S. 58 (1900) and Swafford v. Templeton 185 U.S. 487 (1902) with

Nixon v. Herndon, 273 U.S. 536 (1927) and Nixon v. Condon, 286 U.S. 73 (1932). All four cases challenged the actions of election officials acting pursuant to state law in denying plaintiffs the right to vote. However, Wiley and Swafford, brought prior to Home Telephone, invoked Federal judicial review pursuant to a cause of action sounding directly in Article I, Section 2, of the Constitution; while the White Primary cases, brought subsequent to Home Telephone, invoked the now coterminous Civil Rights Act of 1871. See also, Lane v. Wilson, 307 U.S. 268 (1939). It was not until Justice Stone's concurrence in Hague v. CIO, 307 U.S. 496, 518 (1939) that the distinction between causes of action sounding in the Civil Rights Act of 1871 and causes of action sounding in the Constitution itself was dusted off and given renewed practical significance.

4. Hague v. CIO and the Distinction Between Personal and Property Rights

In Hague v. CIO, 307 U.S. 496 (1939), the plaintiffs sought Federal judicial review of the actions of Jersey City officials in unconstitutionally suppressing First Amendment activity. Plaintiffs' complaint alleged that

defendants were utilizing New Jersey statutes which were valid on their face to harrass and obstruct the dissemination of information concerning the National Labor Relations Act. Plaintiffs alleged two alternative bases of jurisdiction. First, they invoked Federal judicial power under Federal question jurisdiction and a cause of action sounding directly in the First and Fourteenth Amendments and, second, they invoked the Civil Rights Act of 1871 and its jurisdictional analogue 28 U.S.C. §1343(3). Concerned that plaintiffs would be unable to satisfy the amount in controversy requirements of Federal question jurisdiction, Justice Stone embarked upon an analysis designed to permit plaintiffs access to Federal court free from the constraints of satisfying the amount in controversy requirement. He reasoned that the cause of action created by the Civil Rights Act of 1871 had been designed to protect "personal" as opposed to "property" rights and that, since plaintiffs sought the protection of such rights, they were entitled to invoke 28 U.S.C. §1343(3)

which contained no requirement of amount in controversy.[35/] Although Justice Stone wrote for only a plurality of the Court, his distinction between "personal" and "property" rights was widely followed. Hence, after Hague, constitutional cases involving "personal" rights were entitled to invoke Federal judicial consideration free from amount in controversy constraints pursuant to the precursors of 42 U.S.C. §1983 and 28 U.S.C. §1343 (3), while constitutional cases involving "property" rights were obliged to eschew the benefits of the Civil Rights Act of 1871 and seek Federal judicial consideration pursuant to the traditional cause of action sounding directly in the Constitution coupled with general Federal question jurisdiction. Once again, therefore, the Civil Rights Act of 1871 was utilized as a device to provide access

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35/ The Civil Rights Act of 1871, as originally enacted, had contained both a grant of a cause of action and a jurisdictional grant. In 1911, the jurisdictional grant was separately codified as the precursor of 28 U.S.C. §1343(3). The relationship between the cause of action (42 U.S.C. (983) and its jurisdictional counterpart §1343(3) is perceptively described in Craig v. Blue, ___F.2d___ (4th Cir. 1974), and is noted in Lynch v. Household Finance Corporation, 405 U.S. 538 at 543. See, Act of March 3, 1911, c.231, 36 Stat. 1087.

to a Federal forum for cases which would not have qualified under the traditional constitutional cause of action plus Federal question jurisdiction.

Thus, from 1871-1913, the 1871 Act provided a device to circumvent the overly narrow vision of "state action" exemplified by Barney v. City of New York, supra; while in Justice Stone's cosmology (with unauthorized "state action" no longer a problem after Home Telephone), it became the device to circumvent the barrier to judicial review of constitutional deprivations posed by the amount in controversy requirement of Federal question jurisdiction. In both situations, however, the statutory cause of action created by Congress broadened a pre-existing underlying cause of action sounding directly in the Constitution. It was accepted without question that those cases which failed to fit within the broadened scope provided by the statutory cause of action were free to invoke the pre-existing constitutional cause of action. Thus, from 1871-1913, cases involving state-sanctioned unconstitutional activity were free to invoke the underlying independent constitutional

cause of action (e.g., Wiley v. Sinkler, 179 U.S. 58 (1900); Swafford v. Templeton, 185 U.S. 487 (1902)); and from and after Hague, cases involving "property" rights (deprived of access to the Civil Rights Act of 1871 by Justice Stone's distinction) were free to invoke the independent constitutional cause of action so long as the amount in controversy requirement of Federal question jurisdiction was satisfied. E.g., Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969). See the cases cited at note 14, supra; and see generally the discussion at pp. 2 to 14, supra.

In Eisen, a plaintiff sought damages from New York City officials stemming from an unlawful deprivation of property.[36/] Eisen invoked Federal jurisdiction on two theories. First, he invoked the Civil Rights Act of 1871 and, alternatively, Federal question jurisdiction under an independent cause of action sounding directly in the

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36/ The plaintiff in Eisen challenged the constitutionality of New York City's rent control laws. The defendant was the City's Rent Commissioner, sued in his official capacity.

Fourteenth Amendment. Judge Friendly, writing for this Court, dismissed Eisen's cause of action sounding in the 1871 Act on the ground that he sought protection of "property" as opposed to "personal" rights. He sustained jurisdiction, however, under Eisen's alternative theory, while ruling against him on the merits. Eisen, therefore, stands as the clear holding of this Circuit that actions seeking vindication of constitutional rights which fall outside the purview of the Civil Rights Act of 1871 must, nevertheless, be entertained under an independent cause of action sounding in the Constitution itself, so long as the requirements of Federal question jurisdiction are satisfied.

The distinction between §1983 actions for "personal" rights and actions sounding in the Constitution itself for "property" rights was rejected by the Supreme Court in Lynch v. Household Finance Corporation, 405 U.S. 538 (1972), when the Court ruled that the Civil Rights Act of 1871 was intended to provide causes of action for the

constitutional protection of both personal and property rights without the necessity of establishing a jurisdictional amount in controversy. Thus, after Lynch, the statutory cause of action created by the 1871 Act and the underlying constitutional causes of action once again became virtually coterminous -- with the significant exception of the potential defendants against which each may be invoked.

5. Monroe v. Pape and the Liability of Municipalities for Unconstitutional Behavior

In Monroe v. Pape, 365 U.S. 167 (1961), the Supreme Court held that the cause of action provided by the Civil Rights Act of 1871 could not be invoked against municipalities because Congress had not intended to bring municipal corporations within the meaning of the term "person" as used in the Act.[37/] Monroe, just as Haque

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37/ As amici have suggested, it was perfectly reasonable for Congress to have exempted municipalities from liability for a cause of action which was aimed primarily at "unauthorized" official action which was not currently cognizable in a Federal court under pre-Home Telephone notions of state action.

had done in 1939, created a significant distinction between the statutory cause of action created by the 1871 Act and the pre-existing independent constitutional causes of action. While Hague drew a distinction in substantive terms, dependent upon the nature of the right at issue, Monroe erected a distinction between the categories of defendants suable under each. However, just as the excluded plaintiff under Hague was entitled to invoke the underlying constitutional cause of action after being barred from the more liberal 1871 Act, so plaintiffs denied access to the 1871 Act under Monroe must be afforded similar access to the underlying constitutional cause of action.[38]

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38/ It would be a wholly unacceptable result of Lynch if it were to lessen the ability of plaintiffs to seek Federal judicial review. Prior to Lynch, "property" plaintiffs were free to sue municipalities in Federal court under an underlying constitutional cause of action, provided they satisfied the jurisdictional amount of 28 U.S.C. §1331(a). E.g., Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969). Lynch relieved "property" plaintiffs from the jurisdictional amount requirement by recognizing a cause of action under 42 U.S.C. §1983 and jurisdiction under 28 U.S.C. §1343(3). Surely, the recognition of the "easier" access to the Federal courts provided by the Civil Rights Act of 1871

From 1871-1913 and from 1939-1972, the Civil Rights Act of 1871 served as a method of extending Federal judicial review over cases which might not otherwise have qualified under pre-existing constitutionally based causes of action. Its purpose in 1871 and its function throughout its history has been to supplement underlying constitutional causes of action to assure Federal judicial protection of constitutional rights. In its role as a supplemental remedy it has never purported to, and has never been applied to, restrict the underlying causes of action which it was designed to broaden. It would, therefore, constitute a serious mis-reading of the Civil Rights Act of 1871 to construe it as having significantly narrowed the very

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38/ (continued)
cannot foreclose the more traditional "difficult" route, to judicial review if that route proves more advantageous to a plaintiff. A refusal to recognize plaintiff's cause of action herein would reach precisely such an anomalous result since prior to Lynch, the Braults' right to sue the town of Milton was widely recognized. See the discussions at pp. 2 to 14 supra; and see note 14, supra.

pre-existing constitutional causes of action it was designed to supplement. Thus, in omitting municipal corporations from statutory liability, Congress merely relegated plaintiffs to the more difficult route of satisfying a jurisdictional amount prior to invoking Federal judicial review.[39/]

Accordingly, in exempting municipalities from the reach of the Civil Rights Act of 1871, Congress did not intend to restrict alternative remedies for unconstitutional action which might then have existed or which were created subsequently in 1875.[40/]

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39/ Of course, from 1871-1875, a plaintiff wishing to sue a municipality under the constitutional cause of action would have been relegated to state court remedies, with appellate review available in the Supreme Court. Compare, Griggs v. Allegheny County, 369 U.S. 84 (1962).

40/ Several additional factors militate strongly against treating the exemption of municipalities from the reach of the Civil Rights Act of 1871 as an intention to exclude them from the underlying constitutional cause of action as well.

First, to the extent the exclusion of municipalities from the 1871 Act reflected the reluctant judgment of Congress that the Eleventh Amendment barred municipal liability in Federal court, the subsequent history of the Eleventh Amendment has proven the 1871 judgment wholly incorrect. Were Congress in 1871 to have known

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that the Supreme Court would rule local government outside the scope of Eleventh Amendment protection, there seems little doubt that it would have provided for some degree of municipal liability. Surely the erroneous perception of Congress' power in 1871 cannot constitute an expression of intent to limit the scope of causes of action sounding in the Constitution.

Second, the primary basis for the Supreme Court's decision excluding municipalities from the scope of the Civil Rights Act of 1871 was the rejection of the Sherman Amendment on two occasions by the 1871 Congress. Monroe v. Pape, 365 U.S. 167 (1961) at 188-190. However, the Sherman Amendment was an attempt to impose absolute liability upon a municipality for any violation of civil rights occurring within its borders, whether or not the municipality or any of its agents was responsible for the violation. In effect, the Sherman Amendment sought to render municipalities liable as insurers for civil rights violations occurring within their borders. The rejection of such a radical proposal is not the least instructive concerning Congressional intent concerning the liability of a municipality, not as an insurer, but as a principal for the authorized acts of its agents.

Finally, the exclusion of municipalities from the Civil Rights Act of 1871 occurred four years before the establishment of general Federal question jurisdiction. Since the possibility of entertaining constitutional causes of action in the Federal courts did not even exist in 1871, it is somewhat strained to seek a Congressional intent with respect to such "nascent" causes of action. Indeed, were one to follow the traditional pattern of giving effect to the latter of two conflicting Federal statutes (if there is such a conflict), the 1875 Act establishing general Federal question jurisdiction with no hint of exemption for state agencies unprotected by the Eleventh Amendment, would appear to supersede any equivocal indication of a contrary Congressional intent flowing from the 1871 Act.

### D. Federalism Concerns Inherent in Recognizing Municipal Liability for Unconstitutional Behavior

Even if one assumes that the omission of municipalities from liability under the Civil Rights Act of 1871 does not preclude the recognition of a cause of action sounding directly in the Constitution, the issue of whether such a cause of action is precluded by general considerations of Federalism remains to be considered. Amici believe that such considerations have already been considered -- and determined -- by the adoption of the Eleventh Amendment and the exclusion of municipalities from the scope of its protection.

In Chisholm v. Georgia, 2 U.S. (2 Dall) 419 (1793), the Supreme Court upheld its original jurisdiction to hear a suit against Georgia by citizens of South Carolina to recover on bonds which Georgia had confiscated for "conduct inimical to the cause of liberty." In response to the decision in Chisholm, which appeared to repudiate specific representations made by proponents of the Constitution that populist state legislators would not be obliged to subject their debt and monetary policies to the scrutiny of a presumptively hostile Federalist judiciary, the Eleventh

Amendment was enacted, [41] which provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." [42]

The Eleventh Amendment has been interpreted as supplying a basic insulation of state governments from Federal damage actions. See generally, Edelman v. Jordan, 415 U.S. 651 (1974). However, as Edelman recognized, counties, school boards, municipal corporations and independent state agencies have consistently been held to

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41/ The decision in Chisholm was followed by the filing of similar actions against South Carolina, Georgia, Virginia, and Massachusetts. The Georgia House of Representatives reacted to the Chisholm decision by enacting legislation providing that anyone seeking to execute process based on Chisholm was "guilty of felony and shall suffer death, without benefit of clergy." Warren, 1, The Supreme Court in United States History, 100 (2d Ed. 1926).

42/ Since appellants are both citizens of Vermont, the literal wording of the Amendment would appear to exempt them from its coverage. However, the Supreme Court has consistently ignored the literal reading of the Amendment and construed it to bar suits against a state by citizens of the same state. E.g., Hans v. Louisiana, 134 U.S. 1 (1890). But see, Edelman v. Jordan, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting).

the Constitution.[43/]

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43/ Given the greater propensity for friction between a citizen and local government than exists between a citizen and a more remote state government, the refusal to exempt local entities from Federal judicial review of unconstitutional action makes eminently good sense. Even if the Supreme Court had not already resolved the Federalism issue by exempting the town of Milton from the Eleventh Amendment, a serious question exists whether causes of action sounding directly in the Fourteenth Amendment can be thwarted by the application of the Eleventh Amendment. The extent to which the radical alteration in our Federal system wrought by the Thirteenth, Fourteenth and Fifteenth Amendments modified, or abrogated, an Eleventh Amendment wedded to 18th century notions of the Federal union was adverted to in Ex parte Young, 209 U.S. 123 (1908) at 150, but, in view of the narrow view of state action adopted by the Court, it was unnecessary to explore the matter. See also, Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973) and Edelman v. Jordan, 415 U.S. 651, 688, 693 n. 2 (1974) (Marshall, J., dissenting). The issue never arose in Edelman, since the cause of action at issue therein was purely statutory. Thus an additional significant practical difference which may exist between a statutory cause of action sounding in the Civil Rights Act of 1871 and the underlying Fourteenth Amendment constitutional cause of action advanced by appellants is the extent to which it is limited by the Eleventh Amendment. In California v. La Rue, 409 U.S. 109 (1972), Justice Rehnquist suggested that a subsequent Amendment may modify the impact of a prior Amendment. If the comparatively insignificant concerns embodied in the Twenty-first Amendment can modify the paramount values of the First Amendment, surely the core elements of liberty, codified in the Fourteenth Amendment, take precedence over the 18th century notions of absolute state sovereignty inherent in the Eleventh Amendment.

fall outside the exemption provided by the Amendment. E.g., Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964); Chicot County v. Sherwood, 148 U.S. 529 (1893); Workman v. City of New York, 179 U.S. 522 (1900); Cowles v. Mercer County, 7 Wall 118 (1869); Lincoln County v. Luning, 133 U.S. 529 (1890); Charles Simkin & Sons, Inc. v. State University Construction Fund, 352 F. Supp. 177 (S.D. N.Y. 1973) aff'd mem. 486 F. 2d 1393 (2d Cir. 1973); Smith v. Concordia Parish School Board, 493 F. 2d 8 (5th Cir. 1974). See also, Markham v. City of Newport News, 292 F. 2d 711 (4th Cir. 1961); Zeidner v. Wulforst, 197 F. Supp. 23 (E.D. N.Y. 1961); Prendergast v. Long Island State Park Commission, 330 F. Supp. 438 (E.D. N.Y. 1970).

In exempting municipalities and other local entities from the protection of the Eleventh Amendment and in successfully administering a federal system under which such local entities have remained subject to Federal damage actions for one hundred years, the Supreme Court has foreclosed any attempt to exempt municipalities from the reach of the causes of action sounding directly in

## CONCLUSION

To the extent appellants' complaint raises a substantial Federal question arising under the Fifth and Fourteenth Amendments to the Constitution of the United States, they have stated a traditionally recognized cause of action sounding directly in the due process and taking clauses of the Constitution against the town of Milton. Since it is appropriate to recognize the due process and taking clauses of the Constitution as independent sources of Federal rights which may appropriately be enforced by traditional damage remedies, and since neither the exemption of municipalities from the Civil Rights Act of 1871 nor any other principle of Federalism bars the application of a damage remedy to the town of Milton, the panel's decision herein should be affirmed and the case remanded to the District Court for a decision on the merits.

Respectfully submitted,

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BURT NEUBORNE, being duly sworn, deposes and says:

1. I am not a party to this action and am over 21 years of age. I reside at 597 Sixth Street, Brooklyn, New York.

2. On June 2, 1975, I mailed three copies of the amicus brief herein to:

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The addresses provided by each for service of process, by depositing a copy of each in a post-paid pre-addressed wrapper in a mail depository of the United States.

B. Neuborne

Burt Neuborne

Sworn to before me
this 4 day of June, 1975.

Bella Greene

Notary Public

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Of Counsel

June 2, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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|---|---|
| Gerard and Gemma Brault,<br>Plaintiffs-Appellants,<br>-v-<br>Town of Milton,<br>Defendant-Appellee. | Docket No. 74-2370 |

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